Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-195 OF 1996
GOPAL SRI RAM, NH CHAN AND DENIS ONG JJCA
26 OCTOBER 1998

Civil Procedure *— Declaration — Discretion to grant declaration — Discretion vested in trial judge — Trial judge granted plaintiff declaration — Plaintiff used limitation as cause of action — Whether discretion exercised wrongly*

Limitation *— Pleading — Compensation for breach of contract — Dispute as to monies to be paid to plaintiff — Plaintiff contended that defendant's claim to monies barred by limitation — Plaintiff relying on limitation as cause of action — Whether this was permitted by law — Whether equitable for plaintiff to assert limitation*

The appellant ('defendant') was a licensed commodity broker. It traded in commodities in the futures market on the Kuala Lumpur Commodity Exchange ('KLCE') and was a member of the Kuala Lumpur Clearing House ('KLCCH'). The respondent ('plaintiff') is the executor of the estate of Loo Cheng Ghee ('Loo'), a client of the defendant. Loo placed orders with the defendant to buy and sell palm oil in the commodity futures market. Each time Loo placed an order, the defendant entered into a contract with one or more of the other brokers on the floor of the KLCE. Several contracts which Loo had used several brokers to enter into could not be fulfilled and default had taken place. The rules and regulations provided that compensation was to be paid to the aggrieved parties out of monies that were deposited with the KLCCH.

Solicitors for KLCCH wrote to the defendant's solicitors giving an account of the monies belonging to the defendant that were being held by KLCCH. Loo then wrote a letter to the defendant saying that in consideration of the defendant releasing a certain sum of money to him, he would pay all commissions and interest due to the defendant. Disputes then arose over the entitlement to and the amount of compensation. Loo died and his estate pursued the matter. The monies which formed the subject matter of litigation were later paid over to a firm of solicitors to be held by them as stakeholders. The plaintiff argued that the monies in question should be paid to Loo's estate because any claim by the defendant was barred by limitation. The High Court granted the plaintiff a declaration that the plaintiff is entitled to the sum held by the stakeholders. The defendant appealed, submitting that the judge had failed to appreciate that the remedy that was being sought was discretionary in nature and discretion ought to have been exercised against the plaintiff.

Held, allowing the appeal:

(1) The limitation of actions under statute is part of procedural law and is merely a defence to an action. It assumes the existence of a cause of action and does not create one. The defence of

limitation cannot be relied upon unless specifically pleaded. In the present case, limitation was not being relied upon as a defence by either party to the litigation. The plaintiff's claim to the monies in question was based upon the contention that the defendant's claim to them is barred by limitation. Therefore, the plaintiff was actually relying upon limitation as a cause of action and this was not permitted by the law. In any event, the passage of time did not have the effect of extinguishing the defendant's undoubted rights to the monies in question (see pp 660E, H-I and 661A–C).

(2) The element of discretion in the remedy of declaration is vested in the judge at first instance. It is only after an appellant has demonstrated that the trial judge had exercised his discretion wrongly that this court has original discretion of its own. In the present case, the declaration sought by the plaintiff ought to have been refused because: (i) the plaintiff had used limitation as a cause of action; (ii) the true nature of the declaration sought is dependent upon the defendant bringing an action and the plaintiff successfully defeating it on a plea of limitation; and (iii) the plaintiff was using the declaratory judgment to establish his title to the monies in question by relying upon limitation as a cause of action. Discretion, therefore, ought to have been exercised against the plaintiff. This warranted appellate interference and the defendant is entitled to a dismissal of the summons (see p 663F–I).

(3) The agreement between Loo and the defendant that the verified sum would be deducted from the final payment of the balance sum which was yet to be paid to the defendant must be taken to have been admitted by the plaintiff, as the plaintiff failed to deny the existence of such promise. As such, it would be inequitable to permit the plaintiff to assert limitation against the defendant. The judge had failed to address his mind to the relevant evidence that had been placed before him (see pp 664A–C and 665D, G).

[Bahasa Malaysia summary

Perayu ('defendan') merupakan broker komoditi berlesen. Ia berdagang dalam komoditi-komoditi pasaran niaga hadapan di Bursa Komoditi Kuala Lumpur ('BKKL') dan merupakan ahli Gedung Penjelasan Kuala Lumpur ('GPKL'). Penentang ('plaintif') adalah merupakan wasi bagi harta pusaka Loo Cheng Ghee ('Loo'), seorang pelanggan defendan. Loo telah membuat tempahan dengan defendan untuk membeli dan menjual minyak kelapa sawit dalam pasaran niaga hadapan komoditi. Setiap kali Loo membuat tempahan, defendan mengikat kontrak dengan satu atau lebih dari broker-broker yang lain di ruang niaga BKKL. Beberapa kontrak yang Loo telah mengikat dengan beberapa broker tidak dapat dipenuhi dan kemungkiran telah berlaku. Kaedah-kaedah dan peraturan-peraturan memperuntukkan bahawa pampasan hendaklah dibayar kepada pihak-pihak yang terkilan dari wang yang telah didepositkan dengan GPKL.

Peguamcara GPKL telah menulis kepada peguamcara defendan memberikan satu akaun mengenai wang kepunyaan defendan yang dipegang oleh GPKL. Loo kemudiannya telah menulis kepada defendan dengan menyatakan bahawa sebagai balasan defendan melepaskan sesuatu jumlah wang yang tertentu kepada beliau, beliau akan membayar kesemua komisyen dan faedah yang kena dibayar kepada defendan. Pertikaian kemudiannya berbangkit atas keberhakan kepada dan jumlah pampasan tersebut. Loo telah meninggal dunia dan estetnya telah meneruskan perkara tersebut. Wang yang membentuk hal perkara litigasi tersebut telah kemudiannya dibayar kepada sebuah firma peguamcara supaya dipegang oleh mereka sebagai pemegang amanah harta. Plaintif berhujah bahawa wang yang dipersoalkan seharusnya dibayar kepada estet Loo kerana sebarang tuntutan oleh defendan telah dihalang oleh had masa. Mahkamah Tinggi telah memberikan plaintif satu perisytiharan bahawa plaintif adalah berhak kepada jumlah yang dipegang oleh pemegang-pemegang amanah harta tersebut. Defendan telah merayu, dengan berhujah bahawa hakim telah gagal untuk mempertimbangkan bahawa remedi yang sedang dipohon itu adalah bersifat budi bicara dan budi bicara seharusnya telah dilaksanakan terhadap plaintif.

Diputuskan, membenarkan rayuan:

(1) Penghadan tindakan-tindakan di bawah statut merupakan sebahagian daripada undang-undang prosedur dan adalah semata-mata merupakan satu pembelaan kepada sesuatu tindakan. Ia mengandaikan kewujudan suatu kausa tindakan dan tidak mewujud sesuatu kausa tindakan. Pembelaan had masa tidak boleh dipertanggungjawabkan kecuali diplidkan secara khususnya. Dalam kes ini, had masa tidak dipertanggungjawabkan sebagai satu pembelaan oleh mana-mana satu pihak kepada litigasi itu. Tuntutan plaintif kepada wang yang dipersoalkan adalah berasaskan penghujahan bahawa tuntutan defendan kepadanya adalah dihalang oleh had masa. Dengan itu, plaintif sebenarnya bergantung ke atas penghadan sebagai satu kausa tindakan dan ini tidak dibenarkan oleh undang-undang. Dalam sebarang keadaan, perjalanan masa tidak mempunyai kesan memadamkan hak defendan yang tidak diragui kepada wang yang dipersoalkan itu (lihat ms 660E, H-I dan 661A–C).

(2) Unsur budi bicara dalam remedi perisytiharan adalah terletak pada hakim yang pertama. Hanya selepas perayu telah menunjukkan bahawa hakim perbicaraan telah melaksanakan budi bicaranya secara salah barulah mahkamah ini mempunyai budi bicara asalnya yang tersendiri. Dalam kes ini, perisytiharan yang dipohon oleh plaintif seharusnya telah ditolak kerana: (i) plaintif telah menggunakan had masa sebagai satu kausa tindakan; (ii) sifat sebenar perisytiharan yang dipohon bergantung pada permulaan satu tindakan oleh defendan dan kejayaan plaintif dalam mematahkan tindakan itu atas hujah had masa; dan (iii) plaintif menggunakan penghakiman perisytiharan untuk

menentukan hakmiliknya kepada wang yang dipersoalkan dengan bergantung pada penghadan sebagai satu kausa tindakan. Dengan itu, budi bicara seharusnya dilaksanakan terhadap plaintif. Ini mewajarkan campur tangan rayuan dan defendan adalah berhak kepada penolakan akan saman tersebut (lihat ms 663F–I).

(3) Perjanjian antara Loo dan defendan bahawa jumlah yang diubah akan ditolak daripada pembayaran muktamad jumlah baki yang masih belum dibayar kepada defendan mestilah dianggap sebagai telah diakui oleh plaintif, kerana plaintif telah gagal untuk menafikan kewujudan janji yang sedemikian. Oleh yang demikian, ia tidak saksama untuk membenarkan plaintif untuk menegaskan had masa terhadap defendan. Hakim telah gagal untuk menumpukan pemikiran kepada keterangan relevan yang telah dikemukakan kepadanya (lihat ms 664A–C dan 665D, G).]

Notes

For cases on discretion to grant declaration, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1516–1518.

For a case on compensation for breach of contract, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1879.

Cases referred to

Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal [1995] 2 MLJ 620 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

City of London v Horner (1914) 111 LT 512 (refd)

Everett v Griffiths [1924] 1 KB 941 (refd)

Faber Merlin (M) Sdn Bhd v Lye Thai Sang & Anor [1985] 2 MLJ 380 (refd)

Hanson v Radcliffe Urban District Council [1922] 2 Ch 490 (refd)

Hari Nath Chatterjee v Mothurmohun Goswami (1894) ILR 21 Cal 8 (refd)

Lim Kim Cheong v Lee Johnson [1993] 1 SLR 313 (refd)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Othman & Anor v Mek [1972] 2 MLJ 158 (refd)

Plunkett v Bull (1915) 19 CLR 544 (refd)

R v Attorney-General, ex p Imperial Chemical Industries Plc (1986) 60 TC 1 (refd)

Rediffusion (Hong Kong) Ltd v A-G of Hong Kong & Anor [1970] AC 1136 (refd)

Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)

Trawnik & Anor v Ministry of Defence [1984] 2 All ER 791 (refd)

Vine v National Dock Labour Board [1957] AC 488 (refd)

Legislation referred to

Crown Proceedings Act 1947 [UK]
Limitation Act 1953 s 4
Specific Relief Act 1950 s 41

Appeal from: Originating Summons No S3–24–563 of 1994 (High Court, Kuala Lumpur)

MS Murthi (*Iza Ng Yeoh & Kit*) for the appellant.
Prasad Abraham (*Prasad Abraham & Associates*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering judgment of the court): This appeal has been brought against the decision of the High Court at Kuala Lumpur granting the respondent ('the plaintiff') certain relief, including a declaration that 'the plaintiff as executor of the estate of Loo Cheng Ghee ('Loo') is entitled to the sum of RM3,500,000 presently held in an interest bearing escrow account in the name of Messrs Nahappan, Dorairaj & Danker as stakeholders.' The appellant ('the defendant') has argued that the judge should have refused the declaratory relief sought and dismissed the plaintiff's originating summons.

When the appeal was called on, counsel on both sides informed us that the only point at issue before us was one of limitation. However, in order to appreciate the context in which the point arose, it is necessary to hearken to the factual background against which this appeal rests. There is a long history to the controversy before us. But there is not much dispute about the facts.

The defendant, at all material times, was a licensed commodity broker. It bought and sold all sorts of commodities in the futures market on the floor of the Kuala Lumpur Commodity Exchange ('KLCE'). It was a member of the KLCE. It was also a member of the Kuala Lumpur Clearing House ('KLCCH'). Supervision and regulation of commodity futures trading was in the hands of the Commodity Trading Council ('CTC'). Contracts for the sale and purchase of commodities were governed by the rules and regulations of the KLCE and the KLCCH.

Loo was a client of the defendant. He placed orders with the defendant to buy and sell palm oil in the commodity futures market. Each time Loo placed an order, the defendant entered into a contract with one or more of the other brokers on the floor of the KLCE. The primary obligation of the buyer was to accept delivery of the agreed quantity of palm oil at some future date fixed for performance by the particular contract. If there was default on the part of the seller, then the obligation to make physical delivery was replaced by an obligation to compensate the buyer. The rules and regulations under which commodities were traded provided a mechanism for the settlement of the contracts made on the floor of the KLCE. The mechanism included the payment of compensation to the aggrieved parties out of monies that were deposited with the KLCCH.

At some point in 1984, it became clear that several of the contracts entered into on the floor of the KLCE could not be fulfilled. There were numerous defaults. It transpired that Loo had used several brokers to enter into the palm oil futures contracts upon which default had taken place. The mechanism for the settlement of contracts was activated.

On 24 November 1984, M/s Shook Lin & Bok who were solicitors for KLCCH wrote to M/s Shearn Delamore & Co who were the solicitors then representing the defendant. In it, they gave an account of the monies belonging to the defendant that were being held by their client. Including interest, it amounted to RM20,579,150.45. Out of this sum, RM13,272,929.23 was sent under cover of this letter. The balance of RM7,306,221.22 was retained by KLCCH to meet claims for compensation.

Two days later, on 26 November 1984, Loo wrote a letter to the defendant. He said that in consideration of the defendant releasing the sum of RM13,272,929.23 to him, he would pay all commissions and interest due to the defendant, subject to verification of the defendant's claim by a named third party. About a month later, on 27 November 1984, the third party verified that a sum of RM833,492.17 was due as commissions and interest to the defendant.

Later, disputes then arose over the entitlement to and the amount of compensation. Litigation followed. There were numerous suits. Both Loo and the defendant laid claim to part of the compensation monies. The CTC issued an order freezing payment of the compensation claimed by the defendant and Loo. In the meantime, Loo died. However, his estate pursued the matter. The compensation monies which formed the subject matter of litigation were later paid over to M/s Nahappan, Dorairaj & Danker, a firm of solicitors to be held by them as stakeholders.

After many years, the parties to the litigation commenced negotiations for an amicable settlement of their claims. The negotiations were spearheaded by the CTC which understandably wanted a resolution of the long standing disputes. A draft agreement was prepared. It contained a clause providing for the payment of the disputed sum to the plaintiff. But the defendant did not agree to this provision. It claimed a set off in respect of the monies owed to it by Loo. On 10 November 1992, a firm of accountants representing the defendant wrote to the CTC voicing their objections.

Eventually, the parties to the several suits entered into an agreement. They called it 'the settlement agreement'. We will do likewise. The history of the matter is set out in the recitals to the settlement agreement which is dated 9 June 1994 and is produced in the record of appeal. For completeness they are set out below:

> A Sometime in March 1984, the defaulting KLCCH members were directed and required under reg 10(d) of the KLCCH Regulations to put up additional margin requirements and deposit payments which payments the defaulting KLCCH members failed to make and were unable to meet, and as a result of which, the KLCE suffered a default in the crude palm oil futures market.

B On 13 March 1984, Sakapp, Sun, Frank and Jazal were in default of payment of the additional margin payment requirements and BP defaulted on 14 March 1984. The total number of defaulted contracts was 5150.

C Upon the aforesaid defaults, the KLCCH invoked 11 of the KLCCH General Regulations for Future Delivery Business by invoicing back the contracts registered in the name of the KLCCH members by way of compulsory settlement at the price fixed by the KLCE in accordance with r 300(d) of the KLCE.

D The said invoice back prices were duly paid by the KLCCH to the respective KLCCH members holding buying positions on the contracts that were defaulted on.

E The KLCE further determined the element of compensation payable to the aggrieved parties of the defaulted contracts as provided for in its Emergency Rule 300(f) and advised the KLCCH that the settlement price should include the compensation element.

F On 17 March 1984, the then Commodities Trading Council at an emergency meeting resolved in the exercise of its powers under s 5(c) of the Commodities Trading Act 1980 ('the CTA') to direct the KLCCH to freeze with immediate effect all funds held by the KLCCH for the accounts of the defaulting KLCCH members 'pending the outcome of an investigation by the Commissioner of Commodities Trading into their activities which have brought about defaults in the performance of their contracts, with a view to protecting the interests of persons who have suffered losses as a consequence of the defaults of such members.'

G As a result of the aforesaid defaults and the subsequent dispute between the KLCE and the KLCCH on the issue of compensation payable in accordance with the KLCE r 300(f), legal proceedings were commenced by the aggrieved parties to the disputes and the cases outstanding to date are as follows:

(i) Kuala Lumpur High Court Civil Suit No C2324 of 1984.

Palmco Holdings Sdn Bhd in a representative action sought a declaration from the High Court of Kuala Lumpur that KLCCH was liable to pay them the full settlement price including the compensation element as determined by the KLCE. Alternatively, they sought a declaration that the defaulting KLCCH members including another broker company, Intracom (M) Sdn Bhd, were liable on the claim.

(ii) Kuala Lumpur High Court Civil Suit No 1139 of 1984.

The KLCCH was claiming from M&P a sum of RM2,114,966.36 for defaulting on payment of deposits in the trading of 761 crude palm oil contracts in late February 1984. M&P filed a counterclaim against the KLCCH for a sum of RM198,519.05 for KLCCH's failure to register the said contracts.

(iii) Kuala Lumpur High Court Civil Suit No C509 of 1984.

Sakapp sought to challenge the decision of the KLCCH calling for additional margin payments.

(iv) Kuala Lumpur High Court Civil Suit No C3774 of 1984.

Sakapp sought to challenge the validity of the KLCCH's decision of 13 March 1984 holding that Sakapp was in default.

(v) Kuala Lumpur High Court Civil Suit No C2400 of 1984. A

Sakapp sought an order that the KLCCH was liable to pay them all monies held by the KLCCH in Sakapp's account with the KLCCH and a declaration that the direction to the KLCCH on 19 March 1984 to freeze all monies held by the KLCCH for the account of Sakapp is unreasonable, ultra vires and void.

(vi) Kuala Lumpur High Court Civil Suits No C2420 of 1984 and No C1890 of 1984. B

Sun sought to challenge the validity of the KLCCH's decision of 13 March 1984 holding that Sun was in default. Sun also sought a declaration challenging the KLCCH's imposition of a RM1m buffer. C

(vii) Kuala Lumpur High Court Civil Suit No D2–22–1338–89.

The KLCE obtained judgement in default of appearance against BP on 27 November 1989 for the sum of RM224,955.33 with interest thereon and costs in an action founded on the rights and remedies (against BP) of the successful claimants on the compensation fund, which were subrogated to the KLCE following such compensation payments. Consequently, the KLCE commenced proceedings against the KLCCH to garnish part of the said funds and the garnishee proceedings have been adjourned sine die in view of this agreement. D

H The aggrieved parties and their clients are as set out in Pts A and B of Sch 1 annexed hereto. Part A consists of the aggrieved parties on whose behalf Palmco instituted legal action and Pt B consists of the other aggrieved parties and their clients. E

I The major common client of the defaulting KLCCH members at the material time was one Loo Cheng Ghee, managing director of Kentucky Fried Chicken, now deceased and currently represented by his executor. F

J The clients of the defaulting KLCCH members are as set out and identified in Sch 2 annexed hereto.

K One of the members of the KLCE, one Lee Oil Mills (Malaysia) Sdn Bhd ('LOM') of 234 Jalan Kapar, 41400 Klang, was not paid any compensation as LOM, at the material time being a member of the KLCE, was not entitled by virtue of s 81(2) of the CTA to any payment under the compensation fund pursuant to s 81(2) of the CTA. G

L The KLCE further made determinations allowing or partially allowing claims for compensation and in some cases, payments out of the compensation fund to the clients of certain defaulting KLCCH members as listed in cl 4 herein including to clients of one SY Commodities Sdn Bhd ('SY') of Suite 7.05, Wisma KUMB, 113 Jalan Pudu, 55100 Kuala Lumpur, a member of the KLCE and presently in liquidation, which payments the KLCE is entitled to be repaid as subrogatee pursuant to s 89 of the CTA. H

M The KLCCH and KLCE together with Palmco, the defaulting KLCCH members and M&P are desirous of settling the dispute hereinbefore referred to and have appointed Messrs Nahappan, Dorairaj & Danker, advocates and solicitors of No 20, Jalan Pudu Lama, Bukit Mahkamah, 50200 Kuala Lumpur to act as stakeholders ('the stakeholder') and to make the necessary arrangements in respect of the payment out of the funds currently held by the KLCCH in accordance with the terms and conditions as set out herein. I

N The KLCE and KLCCH are desirous of settling all outstanding claims by the KLCCH, including the claim for compensation by the KLCCH in respect of the early termination of the clearing services agreement entered into between the KLCE and the KLCCH and dated 28 October 1985 on the basis of an ex-gratia payment without any admission of liability by KLCE and on a 'full and final settlement of all claims' basis.

O Upon settlement being reached upon the terms and conditions contained herein, the Commodities Trading Commission will thereby issue a directive lifting the freeze on the funds currently held by the KLCCH and the KLCCH shall make payment to each and all of the parties as stipulated herein.

Clause 7 of the settlement agreement provides as follows:

> Simultaneously with the settlement of the sums in the preceding clauses, the KLCCH will pay the sum of RM3.5m (Malaysian Ringgit three million and five hundred thousand only) out of the said funds to the stakeholder which sum shall be immediately placed by the stakeholder in an interest bearing escrow bank account to be nominated by the executor, and shall not be released or in any way dealt with by the stakeholder pending the outcome of the application to be made by the executor to the High Court in Kuala Lumpur for a declaration as to the claim by Sakapp against the estate of Loo Cheng Ghee, deceased ('the proceedings').
>
> The stakeholder shall upon the expiry of 14 days from the receipt of the sealed order of court in respect of the proceedings release the sum held by them under the clause herein in the manner specified in the said order, provided that all interest accrued on the said sum shall be to the account of the estate of Loo Cheng Ghee, deceased.
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> The payments stated in the clause herein shall be in full and final settlement of all claims arising thereon and the said estate and/or its beneficiaries will not have any further claims against the KLCE and/or KLCCH thereafter or against any other party to this agreement in respect of the defaulted contracts.

It is pursuant to this clause that the plaintiff took out the originating summons mentioned earlier in this judgment. At the hearing of the summons before the learned judge, it was argued for the plaintiff that the monies in question should be paid to Loo's estate because any claim to them by the defendant was barred by limitation. The learned judge accepted this argument. In a note consisting merely of three paragraphs he said:

1 I agree with counsel for the plaintiff that time, for purposes of limitation, began to run from 27 November 1984, the date when the sum due was verified as stated in the deceased's letter dated 26 November 1984. So the claim was statute-barred.

2 In face of those documents, there is no basis for defendants saying in para 16 of affidavit (4) that the agreement was to set off amount due to defendant from final payment.

3 PSP 1, 2, 3.

When the defendant applied for the learned judge's grounds of judgment, the foregoing note was made available to its solicitors as the 'judgment' of the court. We say at once that the rather short and somewhat cryptic note of the learned judge is not a 'speaking judgment', that is to say, a judgment

that reveals the thought process by which a court arrives at its conclusion. The note made available by the learned judge merely sets out his decision upon the plaintiff's summons. The absence of proper grounds of judgment which the learned judge was duty bound to produce has seriously impeded this court and has resulted in our having to reconsider the material on record with a view of arriving at a decision upon this appeal.

Before us, it was argued for the plaintiff that the declaration was rightly given. In opposing the appeal, counsel for the plaintiff repeated the arguments he had advanced in the court below.

The defendant on the other hand submitted that the learned judge had overlooked some salient aspects of the case. Thus, the learned judge had failed to appreciate that the remedy that was being sought was discretionary in nature. There existed in the present case material upon which discretion ought to have been exercised against the plaintiff. Additionally, the learned judge ought to have held in favour of the defendant upon the limitation point because of Loo's conduct in all the circumstances of the case. Allowing the plaintiff (in effect Loo) to succeed upon the limitation point amounted to his using the Limitation Act 1953 as an engine of fraud. This ought not to be countenanced. So much for the defendant's submissions in support of the appeal.

In our judgment, the present appeal falls to be decided in accordance with settled principles. It is beyond argument that the limitation of actions under statute is part of procedural and not substantive law. As Ong CJ said in *Othman & Anor v Mek* [1972] 2 MLJ 158 at p 160:

> Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 *Halsbury's Laws of England*, 3rd Ed, p 181. A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see *Holmes v Crowther* [1970] 1 WLR 835 where it was held that although under s 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors nevertheless were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, *whether statute-barred or not.* (Emphasis added.)

In the same case, Ong Hock Sim FJ said (at p 165):

> Statutes of limitation (as in this case) which bar the remedy but not the right, are rules of procedure only: (see 24 *Halsbury's Laws of England* (3rd Ed) p 181).

Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice of the Board of the Privy Council in *Hari Nath Chatterjee v Mothurmohun Goswami* (1894) ILR 21 Cal 8 at p 18: 'The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right.' Further, the defence of limitation cannot be relied upon unless specifically pleaded. (See s 4 of the Limitation Act 1953.)

A It is noteworthy that in the present case, limitation is not being relied upon as a defence by either party to the litigation. A reading of the affidavits exchanged before the High Court and the arguments of counsel as recorded by the learned judge make it abundantly clear that the plaintiff's claim to the monies in question is based upon the contention that the defendant's claim to them is barred by limitation. In effect, what the B plaintiff is saying is really this: 'You (the defendant) cannot have the monies in question because if you bring an action to recover them, your claim will be defeated if I successfully plead limitation. I am therefore entitled to those monies.' Putting aside for a moment the hypothetical element, it is apparent that the plaintiff is in truth relying upon limitation C as a cause of action. And this is precisely what the law does not permit. In any event, the passage of time did not have the effect of extinguishing the defendant's undoubted rights to the monies in question: *Othman & Anor v Mek*.

It is beyond dispute that the remedy of declaration is discretionary in D nature. Section 41 of the Specific Relief Act 1950 reads as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and *the court may in its discretion* make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
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> E
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> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> Explanation — A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.' (Emphasis added.)
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Although s 41 is not a complete code upon the subject of declaratory decrees (*Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620) and the power to make a declaration is almost unlimited (*Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490 G at p 507 per Lord Sterndale MR), yet, the remedy of declaration may be refused upon settled principles. Thus, generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available (*Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41) or upon hypothetical issues or upon an issue of no practical consequence (*Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313) or where it may be H premature to grant a declaration (*Rediffusion (Hong Kong) Ltd v A-G of Hong Kong & Anor* [1970] AC 1136) or where a plaintiff is guilty of laches (*Faber Merlin (M) Sdn Bhd v Lye Thai Sang & Anor* [1985] 2 MLJ 380) or other inequitable conduct (*City of London v Horner* (1914) 111 LT 512) or where a 'cloaked declaration', that is to say, a declaration for a collateral I purpose (*Trawnik & Anor v Ministry of Defence* [1984] 2 All ER 791) or with an improper motive, is sought (*Everett v Griffiths* [1924] 1 KB 941 at p 960). We wish to make it plain that this list is by no means exhaustive. We merely seek to demonstrate the wide variety of circumstances in which declaratory relief may be denied in the exercise of discretion.

In the *Rediffusion* case, Lord Diplock made clear the difference between jurisdiction and discretion in a passage that merits recall. He said (at p 1155):

> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the court to entertain the action at all, i.e., to embark upon the inquiry whether facts exist which would entitle the court to grant relief claimed, and a settled practice of the court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. The application of a discretion to refuse relief even though this may be pursuant to a settled practice is an exercise of jurisdiction, not a denial of it.

That the law will not permit an abuse of the declaratory judgment procedure is illustrated by *Trawnik & Anor v Ministry of Defence*. There, the plaintiffs were West German residents whose houses adjoined a military airfield occupied by the British. They brought an action for a declaration in England claiming that the Ministry of Defence should not use the airfield so as to cause a nuisance to the plaintiffs by noise. The Ministry applied to have the action struck out on the ground that it should have been properly brought as an action in tort, in which event a complete defence would be available to it under the Crown Proceedings Act 1947. Megarry VC when granting the application said (at p 797):

> If a prospective defendant is immune from liability in tort, I do not think that it is open to a plaintiff who will suffer from his acts to avoid that immunity by the simple device of framing the proceedings as a claim for declarations instead of as a direct claim in tort. The immunity is in tort, and no alteration in the mode of proceeding will alter that. It seems to me to be improbable in the extreme that, apart from the 1947 Act, the position could be that the Crown is immune from all proceedings in tort save that a declaration can be made that certain conduct by the Crown is tortious and wrong, and should not take place or be continued. I do not think that it would make any difference even if the declarations sought were to be reworded so as to speak of the rights of the plaintiffs rather than the wrong of the defendant. You do not prevent a claim for a declaration from being a claim in tort by saying that what you seek is not a declaration that the acts of the defendant are unlawful or tortious, but a declaration that you have a right not to be injured by the defendant's unlawful acts or torts.

It has been said that the court should be cautious in granting declaratory relief. Thus, Viscount Finlay in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at p 445 said that the power to grant declarations should be 'exercised sparingly', 'with great care and jealousy' and 'with extreme caution'. However, the learning that has later flowed upon the subject points to Viscount Finlay's language as merely reminding a court for the need to exercise judicially the discretion to grant a declaration. Viscount Kilmuir LC made this clear in *Vine v National Dock Labour Board* [1957] AC 488 when he said (at pp 499):

> The granting of a declaration is a matter of discretion and in view of the opinions expressed by the majority of the Court of Appeal, I have considered what was said on this subject in your Lordships' House in *Russian Commercial*

A *and Industrial Bank v British Bank for Foreign Trade Ltd* [1912] 2 AC 438. In that case Lord Finlay said, in the course of his dissenting opinion: 'The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by Mr Hogg.' Lord Finlay then cited the expressions used in those earlier cases: 'sparingly', 'with great care and jealously', 'with
B extreme caution.' I agree that the discretion should not be exercised save for good reason. On the other hand, I find helpful the Scottish tests set out in that case by Lord Dunedin, who said (at p 488): 'The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the
C declaration sought.' It seems to me that, however 'cautiously' or 'sparingly' the discretion is to be exercised, this is a case in which the judge was right to grant a declaration.

Absent a fact pattern entitling a court from withholding relief in accordance with settled practice, a plaintiff should be granted the declaration he seeks.
D We would, with respect, agree with the following remark of Lord Oliver in *R v Attorney-General, ex p Imperial Chemical Industries Plc* (1986) 60 TC 1 at p 64:

> It does seem to me that it must be wrong in principle when a litigant has succeeded in making good his case and has done nothing to disentitle himself to relief, to deny him any remedy unless, at any rate, there are
E extremely strong reasons in public policy for doing so.

We have thus far referred to the element of discretion in the remedy of declaration. What calls for emphasis is that declaratory discretion is vested in the judge at first instance. In an appeal of the nature in the present instance, the initial function of this court is one of review only. It is only
F after an appellant has satisfactorily demonstrated that the trial judge had exercised his discretion wrongly in the sense that had taken into account irrelevant considerations or omitted relevant considerations or asked himself the wrong question or had misdirected himself on the law that this court becomes seized of an original discretion of its own.

G Applying what we apprehend to be settled law to the facts of the present case, we are compelled to the conclusion that the declaration sought by the plaintiff ought to have been refused. In the first place, as we have earlier observed, this is a case where the plaintiff has used limitation as a cause of action contrary to established authority. Second, the true nature of the declaration sought is hypothetical in that it is dependent
H upon the defendant bringing an action and the plaintiff successfully defeating it on a plea of limitation. Third, the plaintiff appears to be using the device of the declaratory judgment to achieve a collateral purpose in that he is seeking to establish his title to the monies in question by relying upon limitation as a cause of action. In accordance with settled practice, discretion
I ought to have been exercised against the plaintiff.

Nowhere in his brief note has the judge addressed his mind to any of these critical matters. Accordingly, this is a case which warrants appellate interference and the defendant is entitled to a dismissal of the summons.

There is yet another reason why the defendant should succeed on equitable grounds. In para 14 of the affidavit of Ler Cheng Chye (the defendant's director) dated 1 September 1994 and filed on the defendant's behalf, it is alleged that there was an agreement between Loo and the defendant that the verified sum 'would be deducted from the final payment of the balance sum which was yet to be paid to the defendant.' This important allegation of fact has not been denied in the affidavits delivered by the plaintiff. In accordance with established principles governing the judicial appreciation of affidavit evidence, the defendant's averment must be taken to have been admitted by the plaintiff. As this court observed in *Ng Hee Thoong v Public Bank Bhd & Anor* [1995] 1 MLJ 281 at p 286, 'it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.'

Based on the foregoing evidence, it has been argued before us by the defendant that the plaintiff ought not to be permitted to rely on limitation to defeat the defendant's right to the monies in question because it would be inequitable to do so. In support of this argument, counsel relied upon the following passage in the judgment of this court in *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 at pp 155–156:

> The doctrine of estoppel — whether one calls it promissory estoppel, estoppel by encouragement or estoppel by convention does not really matter — has reached such a stage that it may be used to deprive a litigant of the benefit of a procedural statute such as the Limitation Act 1953. The law upon this subject has been stated by Edgar Joseph Jr J (as he then was) in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at pp 244–245. A reading of his Lordship's judgment in that case has left me with the impression that little or nothing may be usefully added to the learning contained therein.
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> Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud'. It is a doctrine of wide operation. Its content was explained by Mohd Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words:
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> > 'It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see Spry on *Equitable Remedies* (2nd Ed) at p 236).'
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> The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953.

In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 344, the Federal Court observed as follows:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1953.

In the present instance, the admitted promise by Loo was to pay the sum legitimately due to the defendant out of the balance of the monies which, according to other evidence earlier adverted to, were in the hands of KLCCH. Applying the principles set out in the cases referred to a moment ago to the facts and circumstances of the instant case, it would, in our judgment, be inequitable to permit Loo, and hence his estate represented by the plaintiff, to assert limitation against the defendant.

We must make mention that in arriving at our conclusion on this branch of the case, we very much have in mind the judgment of Isaac J in *Plunkett v Bull* (1915) 19 CLR 544 where he said (at p 548):

> ... in cases of this sort, the court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the court looks on the plaintiff's case with suspicion and as prima facie fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue.

In the present case, it was open to the plaintiff to deny the existence of any such promise as alleged by the defendant. Had this happened, and the defendant wished to pursue the matter further, the issue would have become a disputed question of fact necessitating the conversion of the originating summons into a writ for the purpose of taking viva voce evidence. However, the plaintiff's admission of the promise alleged against Loo makes any further inquiry into the matter unnecessary.

It is a matter of regret that the learned judge failed to address his mind to the relevant evidentiary material that had been placed before him. Had he done so, and applied his judicial mind to the relevant principles of law, he would not have reached the conclusion he did. In these circumstances, our duty as an appellate court lies very clearly before us: to intervene and correct the error into which the learned judge fell.

For the reasons already given, we are of opinion that the appeal must be allowed. The declaration and other orders made by the judge are set aside. The plaintiff's originating summons is dismissed. The costs of the appeal and those in the court below, including the costs of the plaintiff's solicitors, must be taxed and paid out of Loo's estate. The deposit paid into court shall be refunded to the appellant.

Appeal allowed.

Reported by David Lai